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IN THE
Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD.,
AND JACK C. PHILLIPS,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION,
CHARLIE CRAIG, AND DAVID MULLINS,
Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL WORKERS, AND NATIONAL ASSOCIATION OF SOCIAL WORKERS COLORADO CHAPTER, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are leading associations of psychologists, physicians, social workers, and mental health professionals.

The American Psychological Association ("APA") is a scientific and educational organization dedicated to increasing and disseminating psychological knowledge; it is the world's largest professional association of psychologists. The APA has adopted multiple research-based policy statements supporting the rights of gay and lesbian people, including a 1975 policy statement denouncing discrimination against gay and lesbian people in employment, housing, public accommodation, and licensing, and a 2011 policy statement supporting full marriage equality for same-sex couples.[2]

Established in 1955, the National Association of Social Workers ("NASW") is the largest association of professional social workers in the United States, with over 120,000 members in 55 chapters. The Colorado

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[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no person other than *amici* contributed money that was intended to fund preparing or submitting this brief.

[2] American Psychological Ass'n, *Resolution on Marriage Equality For Same-Sex Couples* (2011) (denial of marriage equality "perpetuates the stigma historically attached to homosexuality, and reinforces prejudice against lesbian, gay, and bisexual people"); American Psychological Ass'n, *Proceedings of the American Psychological Association, Incorporated, for the year 1974: Minutes of the Annual Meeting of the Council of Representatives*, 30 Am. Psychol. 620 (1975) [hereinafter "*Minutes of the 1974 Annual Meeting of the Council of Representatives*"].

Chapter of NASW has 2,300 members. As part of its mission to improve the quality and effectiveness of social work practice, NASW promulgates professional standards through the NASW *Code of Ethics*, provides continuing education, and develops policy statements on issues of importance to the social work profession. Consistent with those policy statements, NASW supports the adoption of local, state, federal, and international policies and legislation that ban all forms of discrimination based on sexual orientation.[3]

SUMMARY OF ARGUMENT

Amici, leading associations of psychologists, mental health professionals, social workers, and behavioral scientists, present this brief to provide the Court with a review of the pertinent scientific and professional literature supporting the need for the protections of anti-discrimination statutes—such as Colorado's Anti-Discrimination Act—for sexual minorities. The Act prohibits a place of public accommodation from refusing to provide full and equal enjoyment of the goods or services it offers to individuals because of those individuals' sexual orientation. The Act thereby counteracts the stigma that gay, lesbian, and bisexual individuals otherwise continue to experience in their everyday lives, particularly when manifesting their sexual orientation through relationships with others.

Homosexuality and bisexuality are normal variants of human sexual orientation. Most people do not perceive their sexual orientation as a voluntary choice, and

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[3] National Ass'n of Social Workers, *Policy Statement: Lesbian, Gay, and Bisexual Issues*, *in Social Work Speaks* 198, 202 (10th ed. 2015).

interventions purporting to change a person's sexual orientation have not been shown to be safe or effective. Because sexual orientation inherently involves intimate relationships—real, desired, or imagined—same-sex relationships are inextricably linked to homosexuality.

Although attitudes toward sexual minorities and public opinion about laws and policies affecting them have become more favorable over the past few decades, homosexuality remains stigmatized. People who are perceived to be gay, lesbian, or bisexual are subjected to violence, harassment, discrimination, and other types of negative treatment because of their sexual orientation. The majority of gay, lesbian, and bisexual individuals are well-adjusted and lead healthy and productive lives, but health disparities exist between sexual minority and heterosexual populations. Within the sexual minority population, research shows that health problems can be correlated with experiencing stress related to enactments of stigma.

Anti-discrimination statutes like Colorado's Anti-Discrimination Act not only serve to provide individuals with legal protections from discrimination; they also work to counteract the stigma that gay, lesbian, and bisexual individuals otherwise encounter.

ARGUMENT

I. Homosexuality Is A Normal Expression of Human Sexuality, Is Generally Not Perceived As A Choice, and Is Highly Resistant to Change.

Sexual orientation refers to an enduring disposition to experience sexual, affectional, or romantic attractions to men, women, or both. It also encompasses an individual's sense of personal and social identity based on those attractions, on behaviors expressing them, and on membership in a community of others who share them.[4] Although sexual orientation ranges along a continuum from exclusively heterosexual to exclusively homosexual, it is usually discussed in terms of three categories: *heterosexual* (having sexual and romantic attraction primarily or exclusively to members of the other sex), *homosexual* (having sexual and romantic attraction primarily or exclusively to members of one's own sex), and *bisexual* (having a significant degree of sexual and romantic attraction to both sexes).

Unlike strictly individual traits, such as eye color or age, sexual orientation necessarily involves relationships with other people. Sexual acts and romantic attractions are categorized as homosexual or

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[4] *See* National Academy of Sciences' Institute of Medicine, *Report: The Health of Lesbian, Gay, Bisexual, and Transgender People* (2011) [hereinafter "2011 IOM Report"]; A.R. D'Augelli, *Sexual Orientation, in* 7 *Encyclopedia of Psychology* 260 (A.E. Kazdin ed., 2000); G.M. Herek, *Homosexuality, in* 2 *Corsini Encyclopedia of Psychology* 774-76 (I.B. Weiner & W.E. Craighead eds., 4th ed. 2010).

heterosexual according to the biological sex of the individuals involved, *relative to each other*. Indeed, it is only by acting with another person—or desiring to act—that individuals express their heterosexuality, homosexuality, or bisexuality. Thus, sexual orientation is integrally linked to the intimate personal relationships that human beings form with others to meet their deeply felt needs for love, attachment, and intimacy. It defines the universe of persons with whom one is likely to find the satisfying and fulfilling relationships that, for many individuals, comprise an essential component of personal identity.

For decades, the consensus of mainstream mental health professionals and researchers has been that homosexuality and bisexuality are normal expressions of human sexuality; that they pose no inherent obstacle to leading a healthy and productive life; and that gay and lesbian people function well in the full array of social institutions and interpersonal relationships. When the American Psychiatric Association published the first *Diagnostic and Statistical Manual of Mental Disorders* ("DSM") in 1952, homosexuality was listed as a mental disorder. However, this classification reflected social stigma rather than empirical research findings. Recognizing the lack of scientific evidence for this classification,[5] the American Psychiatric Association

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[5] *See, e.g.*, E. Hooker, *The Adjustment of the Male Overt Homosexual*, 21 J. Projective Techniques 18 (1957); B.F. Riess, *Psychological Tests in Homosexuality, in Homosexual Behavior* 296 (J. Marmor ed., 1980); J.C. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality, in Homosexuality* 115 (J.C. Gonsiorek & J.D. Weinrich eds., 1991).

removed homosexuality from the DSM in 1973, stating that "homosexuality *per se* implies no impairment in judgment, stability, reliability, or general social or vocational capabilities."[6] In 1975, the APA adopted a policy reflecting the same conclusion.[7]

Research refutes the claims that most gay men and lesbians experience their sexual orientation as a voluntary choice and that interventions purporting to change a person's sexual orientation are safe and effective. In a U.S. national probability[8] sample of 662

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[6] American Psychiatric Ass'n, *Position Statement: Homosexuality and Civil Rights* (1973), *in* 131 Am. J. Psychiatry 497 (1974).

[7] American Psychological Ass'n, *Minutes of the 1974 Annual Meeting of the Council of Representatives*, *supra* note 2, at 633.

[8] In a probability sample (or, in common parlance, a "representative sample"), every member of the population of interest has a calculable chance of being included. Consequently, assuming a study's methodology is otherwise valid, findings from a probability sample can be generalized to the larger population with a known margin of error. Samples recruited using other methods (*e.g.*, asking for volunteers) are referred to as nonprobability samples. The extent to which findings from a nonprobability sample are generalizable to the larger population cannot be known. The 2011 Institute of Medicine report observed that "the relatively small size of LGBT populations, the lack of research funding, and the sensitivity of questions relating to sexual behavior and gender expression have been barriers to effective probability sampling." 2011 IOM Report, *supra* note 4, at 99. Nevertheless, the IOM report concluded that "studies based on nonprobability samples have yielded valuable information for expanding the field of LGBT research and addressing health service gaps.... In addition to providing general descriptive data for LGBT populations and subgroups, they have served to demonstrate the existence of phenomena; to test experimentally the effectiveness of various behavioral and medical interventions; to assess relationships among

self-identified lesbian, gay, and bisexual adults, only 5% of gay men and 16% of lesbians reported feeling they had "a fair amount" or "a great deal" of choice about their sexual orientation. Fully 88% of gay men and 68% of lesbians reported that they had "no choice at all."[9]

Research and the clinical experience of *amici*'s members also indicate that sexual orientation is highly resistant to change. Although some groups and individuals have offered clinical interventions that purport to change sexual orientation from homosexual to heterosexual—sometimes called "conversion" therapies—these interventions have not been shown to be effective or safe. A review of the scientific literature by an APA task force concluded that sexual orientation change efforts are unlikely to succeed and can be harmful.[10] Major national mental health organizations—

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study variables; to identify differences among groups; and in general, to provide insights into the health-related challenges faced by LGBT populations. In addition, in the absence of data from probability samples, researchers often develop approximations of population patterns when the findings from multiple methodologically rigorous studies with different nonprobability samples converge." *Id.* at 109.

[9] G.M. Herek et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a U.S. Probability Sample*, 7 Sexuality Res. & Soc. Pol'y 176 (2010); *see also* G.M. Herek et al., *Internalized Stigma Among Sexual Minority Adults*, 56 J. Counseling Psychol. 32 (2009). Comparable data for heterosexuals' perceptions of their own sexual orientation are not available.

[10] American Psychological Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009), http://www.apa.org/pi/lgbt/resources/sexual-orientation.aspx; *see*

including *amici*—have adopted policy statements cautioning the profession and the public about treatments that purport to change sexual orientation.[11]

Because sexual orientation is recognized as an integral part of a person's identity, sexual orientation is often listed as a protected category in anti-discrimination statutes, as it is in Colorado's statute, where sexual orientation is recognized as an aspect of an

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also American Psychological Ass'n, *Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts* (2009), http://www.apa.org/pi/lgbt/resources/sexual-orientation.aspx.

[11] *See* American Psychological Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, *supra* note 10; *see also* American Psychological Ass'n, *Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, *supra* note 10; American Psychological Ass'n, *Resolution on Marriage Equality For Same-Sex Couples*, *supra* note 2; American Psychiatric Ass'n, *Position Statement on Psychiatric Treatment and Sexual Orientation* (1998); American Ass'n for Marriage & Family Therapy, *Reparative/Conversion Therapy* (2009); American Medical Ass'n, Policy H-160.991, *Health Care Needs of the Lesbian Gay Bisexual and Transgender Populations* (opposing "the use of 'reparative' or 'conversion' therapy"); National Ass'n of Social Workers, *Position Statement: "Reparative" and "Conversion" Therapies for Lesbians and Gay Men* (2000); American Psychoanalytic Ass'n, *Position Statement on Attempts to Change Sexual Orientation, Gender Identity, or Gender Expression* (2012); American Academy of Pediatrics, *Policy Statement: Office-Based Care for Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 132 Pediatrics 198 (2013); American Academy of Pediatrics, Committee on Adolescence, *Homosexuality and Adolescence*, 92 Pediatrics 631 (1993); *see also* B.L. Frankowski, *Sexual Orientation and Adolescents*, 113 Pediatrics 1827 (2004).

individual's identity akin to disability, race, creed, color, sex, marital status, national origin, or ancestry.

II. Gay, Lesbian, and Bisexual People Are Stigmatized Because of Their Sexual Orientation.

A. The Nature of Stigma

Stigma has been characterized as "an undesired differentness."[12] Although stigma has been defined in a variety of ways, social scientists generally agree that a stigmatized condition or status is one that is negatively valued by society, fundamentally defines a person's social identity, and disadvantages and disempowers those who have it.[13] Stigma is manifested in the attitudes and actions of individuals—such as ostracism, harassment, discrimination, and physical attacks (sometimes referred to as *enacted stigma*)—as well as in social institutions, including the law (referred to as *institutional* or *structural stigma*).[14]

Laws that accord majority groups preferred status highlight the perceived "differentness" of the minority and thereby tend to legitimize prejudicial attitudes and

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[12] E. Goffman, *Stigma* 5 (1963).

[13] *See, e.g., id.*; B.G. Link & J.C. Phelan, *Conceptualizing Stigma*, 27 Ann. Rev. Soc. 363 (2001); J. Crocker et al., *Social Stigma*, *in* 2 *The Handbook of Social Psychology* 504 (D.T. Gilbert et al. eds., 4th ed. 1998).

[14] *See, e.g.*, G.M Herek, *Confronting Sexual Stigma and Prejudice: Theory and Practice*, 63 J. Soc. Issues 905 (2007); P.W. Corrigan et al., *Structural stigma in state legislation*, 56 Psychiatric Serv. 557 (2005).

individual enactments of stigma against the disfavored group. As discussed below, large numbers of gay men and lesbians experience enactments of stigma in the form of violence, discrimination, and other negative actions against them.

An individual's knowledge about the situations and circumstances in which stigma enactments are likely to occur, and her or his desire to avoid being a target, are often referred to as *felt stigma* or *perceived stigma*.[15] Felt stigma can derive from first-hand experiences of stigma enactments as well from witnessing or learning of enactments targeting others. It can motivate sexual minorities to act in self-protective ways, including concealing their sexual orientation or avoiding occasions of potential stigma enactments. Although these actions may be adaptive in the short term, they can ultimately have negative psychological consequences.[16]

Just as sexual orientation is inherently about relationships, so is the stigma associated with homosexuality. Although sexual stigma is often enacted against individuals (*e.g.*, through ostracism,

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[15] G.M. Herek, *Sexual stigma and sexual prejudice in the United States: A conceptual framework, in Contemporary perspectives on lesbian, gay and bisexual identities* 65 (D.A. Hope ed., 2009) [hereinafter "*Sexual stigma and sexual prejudice*"]; A.C. Watson & L.P. River, *A social-cognitive model of personal responses to stigma, in On the stigma of mental illness: Practical strategies for research and social change* 145 (P.W. Corrigan ed. 2005).

[16] J.E. Pachankis, *The psychological implications of concealing a stigma: A cognitive-affective-behavioral model*, 133 Psychol. Bull. 328 (2007); Herek, *Sexual stigma and sexual prejudice*, *supra* note 15.

discrimination, or violence), it is based on those individuals' relationships (actual, imagined, or desired) with others of their same sex. Sexual minority individuals are stigmatized not only because their private desires are directed at people of their same sex, but also because of the nature of their intimate relationships (*i.e.*, because their sexual or romantic partner is of their same sex). Indeed, a person's homosexuality or bisexuality often becomes known to others only when she or he enters into a same-sex relationship, whether that relationship involves a single sexual act or a lifelong commitment to another person. Consistent with this observation, psychological research using indirect indicators of attitudes toward gay men and lesbians (*e.g.*, measures of physiological reactions or implicit biases that may be outside an individual's conscious awareness or control) has often used images of same-sex couples to nonverbally depict gay men or lesbians.[17]

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[17] This body of research has shown that heterosexuals' reactions to same-sex couples are typically more negative than their reactions to heterosexual couples. For example, using stylized images of same-sex and different-sex couples as stimuli, an online study of nearly 20,000 health care providers found among heterosexual providers "moderate to strong implicit preferences for straight people" over lesbian and gay patients. J.A. Sabin et al., *Health Care Providers' Implicit and Explicit Attitudes Toward Lesbian Women and Gay Men*, 105 Am. J. Pub. Health 1836 (2015) (noting that this "widespread" preference manifested both in direct verbal expressions of attitudes and in an indirect indicator of attitudes through performance on the Implicit Association Test); *see also* N. Dasgupta & L.M. Rivera, *From automatic antigay prejudice to behavior: The moderating role of conscious beliefs about gender and behavioral control*, 91 J. Personality & Soc. Psychol. 268 (2006);

B. Homosexuality Remains Stigmatized

Despite recent changes in aggregate public opinion[18]

W.A. Jellison et al., *Implicit and explicit measures of sexual orientation attitudes: in group preferences and related behaviors and beliefs among gay and straight men*, 30 Personality & Soc. Psychol. Bull. 629 (2004); J.A. Tsang & W.C. Rowatt, *The Relationship Between Religious Orientation, Right-Wing Authoritarianism, and Implicit Sexual Prejudice*, 17 Int'l J. Psychol. Religion 99 (2007). Additionally, some recent research has begun to examine how being in a same-sex couple can result in exposure to stressors that are not accounted for at the individual level. *See, e.g.*, D.M. Frost et al., *Couple-level minority stress: An examination of same-sex couples' unique experiences*, J. Health & Soc. Behav. (2017) [pre-published online]; A.J. LeBlanc et al., *Minority Stress and Stress Proliferation Among Same-Sex and Other Marginalized Couples*, 77 J. Marriage & Fam. 40 (2015).

[18] *See, e.g.*, G.M. Herek, *Beyond "homophobia": Thinking More Clearly About Stigma, Prejudice, and Sexual Orientation*, 85 Am J. Orthopsychiatry S29 (2015) (noting changes in law and public opinion); S.T. Russell & J.N. Fish, *Mental Health in Lesbian, Gay, Bisexual, and Transgender (LGBT) Youth*, 12 Ann. Rev. Clinical Psych. 465 (2016); P. Schwadel & C.R.H. Garneau, *An Age-Period-Cohort Analysis of Political Tolerance in the United States*. 55 Soc. Q. 421 (2014) (documenting changes in public opinion toward a variety of groups including sexual minorities). Additionally, focusing on aggregate public opinion data alone ignores the variability of attitudes across and within geographic regions and communities. While some areas of the United States can be characterized as relatively more supportive of sexual minorities, others are less accepting. *See, e.g.*, Pew Research Center, *Behind Gay Marriage Momentum, Regional Gaps Persist* (2012), http://www.people-press.org/2012/11/09/behind-gay-marriage-momentum-regional-gaps-persist/; Pew Research Center, *Same-Sex Marriage Detailed Tables, 2017* (2017), http://www.people-press.org/2017/06/26/same-sex-marriage-detailed-tables-2017/ (detailed tables showing differences in support across U.S.

and the law,[19] homosexuality remains stigmatized in the United States. A substantial portion of sexual minority adults has experienced violence, discrimination, or other negative actions because of their sexual orientation. For example, in a 2013 survey with a nationally-representative sample of gay, lesbian, and bisexual adults, two-thirds (66%) reported experiencing some form of negative treatment because of their sexual orientation.[20]

This stigma manifests in a variety of ways. For example, gay men and lesbians remain disproportionately vulnerable to physical violence and

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geographic regions of up to 19 points); J. Walthall & J. Piacenza, Public Religion Research Institute, *Attitudes on Same-Sex Marriage in Every State* (2015), https://www.prri.org/spotlight/map-every-states-opinion-on-same-sex-marriage/; *but see* M. Stange & E. Kazyak, *Examining the Nuance in Public Opinion of Pro-LGB Policies in a "Red State"*, 13 Sexuality Res. & Soc. Pol'y 142 (2016) (discussing nuances in attitude differences across regions within a single state).

[19] *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

[20] Pew Research Center, *A Survey of LGBT Americans: Attitudes, Experiences and Values in Changing Times* 41 (2013) [hereinafter "*2013 Survey of LGBT Americans*"] (21% said they had been treated unfairly by an employer in hiring, pay, or promotion; 23% reported they had received poor service in restaurants, hotels, or places of business because of their sexual orientation; other reports of negative treatment based on sexual orientation included being threatened or physically attacked (30%), being subjected to slurs or jokes (58%), being made to feel unwelcome at a place or worship or religious organization (29%); and being rejected by a friend or family member (39%)).

hate crimes.[21] As of 2015, sexual orientation bias crimes were the third most common type of hate crimes recorded by the Federal Bureau of Investigation ("FBI").[22] In the most recently-released FBI hate crime statistics, gay, lesbian, and bisexual victims comprised approximately 18% of all hate crime victims, even though they are estimated to constitute only 2% to 4% of the U.S. adult population.[23]

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[21] *Id.* (30% of lesbian, gay, bisexual, and transgender respondents reported being threatened or physically attached because of their sexual orientation or gender identity); *see also* G.M. Herek et al., *Psychological Sequelae of Hate-Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 67 J. Consulting & Clinical Psychol. 945, 948 (1999) [hereinafter *"Psychological Sequelae of Hate-Crime Victimization"*].

[22] Federal Bureau of Investigation, U.S. Department of Justice, *Hate crime statistics 2015*, Table 1 (2016), https://ucr.fbi.gov/hate-crime/2015/tables-and-data-declarations/1tabledatadecpdf [hereinafter *"Hate Crime Statistics 2015"*] (2015 data, recording 1,053 crime incidents and 1,263 victims of hate crimes based on their real or perceived sexual orientation). The FBI data are widely assumed to provide a lower-bound estimate of the actual number of hate crimes against sexual minorities because other data sources indicate that the majority of such crimes go unreported. G.M. Herek, *Documenting Hate Crimes in the United States: Some Considerations on Data Sources*, 4 Psychol. Sexual Orientation & Gender Diversity 143 (2017) [hereinafter *"Documenting Hate Crimes in the U.S."*].

[23] FBI, *Hate Crime Statistics 2015*, *supra* note 22. Surveys using national probability ("representative") samples of lesbians, gay men, and bisexuals indicate that a substantial proportion of this population – considerably more than the FBI statistics suggest – has been the target of violence or other crimes based on their sexual orientation. *See, e.g.*, Pew Research Center, *2013 Survey of LGBT Americans*, *supra* note 20 (30% of lesbian, gay, bisexual, and

The negative effects of criminal victimization of gay and lesbian people are often compounded by hostile or indifferent reactions from law enforcement personnel. In victim surveys conducted by a national coalition of community-based groups, 35% of sexual and gender minority respondents who had interacted with police reported that officers were indifferent to them and 31% reported that officers were hostile; 12% reported being subjected to police misconduct, including excessive force and unjustified arrest.[24] Furthermore, research indicates that much of the violent crime against gay and lesbian people goes unreported. Data from government surveys and community groups reveal that fewer than half of crimes committed against sexual minorities are reported to criminal justice agencies.[25]

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transgender respondents reported being threatened or physically attacked because of their sexual orientation or gender identity); G.M. Herek, *Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the United States*, 24 J. Interpersonal Violence 54 (2009) [hereinafter "*Hate Crimes and Stigma-Related Experiences of Sexual Minority Adults in the U.S.*"] (20% of the lesbian, gay, bisexual sample reported they had been the target of a physical assault or property crime since age 18 because of their sexual orientation). For a discussion of estimates of the size of the U.S. lesbian, gay, and bisexual population, see G.J. Gates, *LGB/T Demographics: Comparisons among population-based surveys*, The Williams Institute (2014), http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-demogs-sep-2014/.

[24] National Coalition of Anti-Violence Programs, *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2016* 34, 41 (2017 ed.).

[25] Herek, *Documenting Hate Crimes in the United States*, *supra* note 22; L. Langton & M.G. Planty, U.S. Bureau of Justice

Sexual minority youth are also at heightened risk. Based on its Youth Risk Behavior Survey, the Centers for Disease Control and Prevention ("CDC") recently reported that gay, lesbian, and bisexual high school students were twice as likely as their heterosexual counterparts to have been threatened or injured with a weapon on school property during the previous 12 months, and nearly three times as likely to say they had not attended school on at least one day during the previous month because they feared they would be unsafe while at or while on their way to or from school.[26] Consistent with the CDC's findings, analyses of data from a large Massachusetts survey of students in grades 9-12 found that the prevalence of having been bullied on school property decreased between 2009 and 2015 among heterosexual students but not among sexual minority students, who remained significantly more

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Statistics, *Hate crime, 2003-2009* (2011), http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1760. Research also indicates that being the target of a violent crime based on sexual orientation may have more negative consequences for the victim, compared to other types of crime. Herek et al., *Psychological Sequelae of Hate-Crime Victimization*, *supra* note 21.

[26] L. Kann et al., *Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors Among Students in Grades 9-12 – United States and Selected Sites, 2015*, 65 Morbidity and Mortality Weekly Report: Surveillance Summaries, Aug. 12, 2016, at 1, 11, 14, 15 (further reporting that 34.2% of gay, lesbian, and bisexual high school students had been bullied on school property and 28% had been electronically bullied during the previous 12 months, and that "[a]cross the 18 violence-related risk behaviors nationwide, the prevalence of 16 was higher among gay, lesbian, and bisexual students than heterosexual students.").

likely than heterosexual students to report having been bullied. Although the prevalence of being threatened or injured with a weapon and of missing school because of concerns about personal safety declined overall between 1995 and 2015, those experiences remained consistently more prevalent among sexual minority students compared to their heterosexual counterparts.[27]

Sexual minorities also continue to face discrimination in housing and employment. A recent field experiment by the U.S. Department of Housing and Urban Development found that housing providers favored heterosexual couples over otherwise identical same-sex couples in approximately 15% of cases.[28] In a 2013

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[27] E. O'Malley Olsen et al., *Trends in School-Related Victimization of Lesbian, Gay, and Bisexual Youths—Massachusetts, 1995–2015*, 107 Am. J. Pub. Health 1116 (2017); *see also* C. Goodenow et al., *Sexual orientation trends and disparities in school bullying and violence-related experiences, 1999–2013*, 3 Psychol. Sexual Orientation & Gender Diversity 386 (2016) (analyzing an overlapping data set and finding that, despite improvements, almost no reduction was seen in sexual orientation disparities in school-related victimization). Similarly, a 2015 survey conducted with a nonprobability sample of more than 10,000 teenage sexual minority and transgender students reported that more than half said they felt unsafe at school because of their sexual orientation. In that survey, more than two thirds of the students said they had experienced harassment because of their sexual orientation, about one fourth had been pushed or shoved, and roughly 1 in 8 had been physically assaulted by hand or with a weapon. J.G. Kosciw et al., Gay, Lesbian and Straight Education Network (GLSEN), *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* (2016).

[28] This experiment compared housing providers' responses to inquiries based on online ads in 50 metropolitan housing markets

survey with a national probability sample, more than 1 in 5 gay, lesbian, and bisexual respondents reported that they had been treated unfairly in the workplace.[29] A

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across the United States. Emails were sent to randomly selected providers from a fictitious potential renter looking to rent housing for herself or himself and a partner. The "renters" were created by the researchers so that their profiles were identical in all respects except whether their partner was of the same sex or the other sex. S. Friedman et al., U.S. Dep't of Housing & Urban Development, *An Estimate of Housing Discrimination Against Same-Sex Couples* vi (2013), https://www.huduser.gov/portal/Publications/pdf/Hsg_Disc_against_SameSexCpls_v3.pdf; *see also* U.S. Dep't of Housing & Urban Development, *Ending Housing Discrimination Against Lesbian, Gay, Bisexual and Transgendered Individuals and Their Families* (2012), https://www.huduser.gov/portal/publications/fairhsg/discrim_samesex.html. In a similar field experiment, which examined both on-line and in-person interactions between prospective "renters" and rental housing providers, providers told gay men about fewer available units than heterosexual men and quoted gay men somewhat higher costs. Lesbians and heterosexual women were generally treated comparably to each other. D.K. Levy et al., Urban Institute, Research Report: *A Paired-Tested Pilot Study of Housing Discrimination against Same-Sex Couples and Transgender Individuals* (2017), https://www.urban.org/sites/default/files/publication/91486/2017.06.27_hds_lgt_final_report_report_finalized_1.pdf.

[29] Pew Research Center, *2013 Survey of LGBT Americans*, *supra* note 20; *see also* B. Sears & C. Mallory, The Williams Institute, *Documented Evidence of Employment Discrimination and Its Effects on LGBT People* (2011), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf (reporting analyses of data from the 2008 General Social Survey, an ongoing national survey conducted by the National Opinion Research Center at the University of Chicago using probability sampling methods; among the 57 self-identified lesbian, gay, and bisexual adults in the sample,

limitation of the data from such surveys is that respondents can only report discrimination of which they are aware. However, discrimination can also occur without an individual's knowledge, such as during the hiring process. In recent field experiments, researchers have found evidence of ongoing discrimination in hiring.[30]

35% said they had been harassed in the workplace and 16% reported having lost a job because of their sexual orientation); *see also* Herek, *Hate Crimes and Stigma-Related Experiences Among Sexual Minority Adults in the U.S.*, *supra* note 23, at 61, 64 (in a national survey with a probability sample of lesbian, gay, and bisexual adults, roughly 18% of gay men and 16% of lesbians said they had been fired from a job or denied a job or promotion because of their sexual orientation).

[30] Field studies indicate that potential employers' perception of an applicants' sexual orientation impacts their response to job applications. *See, e.g.*, E. Mishel, *Discrimination Against Queer Women in the U.S. Workforce: A Resumé Audit Study*, 2 Socius: Soc. Res. for Dynamic World 1, 6 (2016) (conducting experiment in three states and the District of Columbia, and finding that female online job applicants whose past work experience suggested they were nonheterosexual received approximately 29% fewer follow-up contacts for interviews compared to women whose applications were identical except that they did not imply that the applicants were not heterosexual); A. Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 Am. J. Soc. 586 (2011) (yielding similar results in study of gay and heterosexual male applicants in seven states). These studies have found differences across states, suggesting that the likelihood of discrimination varies geographically. Such variation may explain why a third study—which was limited to employers in four cities that had all enacted gay rights ordinances—did not find differences across sexual orientation groups in employer responses. J.M. Bailey et al., *Are Gay Men and Lesbians*

Thus, stigma continues to exist and to affect gay, lesbian, and bisexual individuals in a variety of ways, ranging from violent acts targeted at individuals because of their sexual orientation, to more subtle forms of discrimination in housing and employment. Colorado and other states have an interest in counteracting that stigma through extending the protections of anti-discrimination laws to sexual minorities.

III. Among Sexual Minorities, Being the Target of Stigma Is Associated With Physical and Psychological Health Problems.

Being the target of stigma is also associated with a number of health-related issues that states like Colorado have an interest in addressing.

The link between experiencing stress and manifesting symptoms of psychological or physical illness is well established.[31] To the extent that the sexual

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Discriminated Against When Applying for Jobs? A Four-City, Internet-Based Field Experiment, 60 J. Homosexuality 873 (2013).

[31] *See, e.g.*, P.A. Thoits, *Stress and health: Major findings and policy implications*, 51 J. Health & Soc. Behav. S41 (2010); L. Pearlin et al., *The stress process*, 22 J. Health & Soc. Behav. 337 (1981). Psychological distress is linked to enactments of stigma running the gamut from hate crime victimization to daily "hassles" related to one's sexual orientation *See, e.g.*, G.M. Herek et al., *Psychological Sequelae of Hate-Crime Victimization*, *supra* note 21 (finding higher levels of psychological distress in gay and lesbian hate crime victims, compared to lesbian and gay victims of other crimes against their person); J.K. Swim et al., *Daily Experiences With Heterosexism: Relations Between Heterosexist Hassles and Psychological Well-Being*, 28 J. Sol. & Clinical Psychol. 597 (2009) (finding that "hassles" based on minority status [such as hearing derogatory comments, being excluded from an activity, and

minority population is routinely subjected to additional stress beyond what is normally experienced by the heterosexual population, it could be expected to manifest higher levels of illness and psychological distress.[32]

Indeed, although most lesbian, gay, and bisexual people are healthy and well-functioning,[33] as a population

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receiving poor service in a commercial establishment] are more associated with negative affect compared to experiences with daily hassles that were unrelated to sexual orientation).

[32] The stress that stigma creates for sexual minorities is often referred to as *minority stress*. I.H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 Psychol. Bull. 674 (2003) [hereinafter "*Prejudice, Social Stress, and Mental Health in LGB Populations*"] (noting that minority stress is understood as an excess of stress beyond the stress routinely experienced by heterosexual and sexual minority people alike). Minority stress is associated with directly experiencing enactments of stigma, such as discrimination, as well as anticipating that one may be the target of such enactments of stigma and consequently modifying one's actions as a self-protective strategy (*i.e.*, felt stigma, described *supra*).

[33] In 2011, the National Academy of Sciences' Institute of Medicine (IOM) issued a comprehensive report that examined the state of current knowledge about the health status of sexual and gender minorities, based on a year of study, input from numerous experts, and its review of hundreds of scientific studies. 2011 IOM Report, *supra* note 4. This IOM report stated that "LGBT adults are typically well adjusted and mentally healthy," *id.* at 189, and that "[s]tudies based on probability samples of LGB populations indicate that the majority of LGB adults do not report mental health problems," *id.*; similarly, the report noted that sexual minority youth "are typically well adjusted and mentally healthy," *id.* at 146-147.

they manifest more overall psychological and physical health problems than heterosexual people.[34] These health disparities include elevated rates of depression and other mental health problems,[35] and a higher rate of suicide attempts than heterosexuals.[36] Societal stigma based on sexual orientation is widely considered by

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[34] S.D. Cochran et al., *Sexual Orientation Differences in Functional Limitations, Disability, and Mental Health Services Use: Results from the 2013–2014 National Health Interview Survey*, J. Consulting & Clinical Psychol. (2017) [hereinafter "*Sexual Orientation Differences*"] [pre-published online]; 2011 IOM Report, *supra* note 4; Meyer, *Prejudice, Social Stress, and Mental Health in LGB Populations*, *supra* note 32.

[35] *See, e.g.*, S.D. Cochran et al., *Sexual Orientation and All-Cause Mortality Among US Adults Aged 18 to 59 Years, 2001-2011*, 106 Am. J. Pub. Health 918 (2016); S.D. Cochran et al., *Sexual Orientation Differences*, *supra* note 34.

[36] 2011 IOM Report, *supra* note 4, at 147 ("[S]tudies based on large probability samples have consistently found that LGB youth and youth who report same-sex romantic attraction are at increased risk for suicidal ideation and attempts, as well as depressive symptoms, in comparison with their heterosexual counterparts"); M.P. Marshal, *et al.*, *Suicidality and Depression Disparities Between Sexual Minority and Heterosexual Youth: A Meta-Analytic Review*, 49 J. of Adolescent Health, 115 (2011); J.R. Blosnich et al., *Suicidality and sexual orientation: Characteristics of symptom severity, disclosure, and timing across the life course*, 86 Am. J. Orthopsychiatry 69 (2016); *but see* S.D. Cochran & V.M. Mays, *Mortality risks among persons reporting same-sex sexual partners: Evidence from the 2008 General Social Survey-National Death Index data set*, 105 Am. J. Pub. Health 358 (2015) (finding greater risk for suicide mortality among women who have had sex with women, compared to presumptively heterosexual women, but no significant difference in suicide mortality risk between men who have had sex with men and presumptively heterosexual men).

researchers and professionals to play a central role in creating and perpetuating these disparities.

Based on numerous studies and extensive expert input, the National Academy of Science's Institute of Medicine concluded that "[c]ontemporary health disparities based on sexual orientation and gender identity are rooted in and reflect the historical stigmatization of LGBT people."[37] It further recommended that "[t]he shared and common experience of stigma and the influences and impact of minority stress should be considered as central to LGBT health in addressing all of the areas on the committee's recommended research agenda."[38]

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[37] 2011 IOM Report, *supra* note 4, at 13 (collecting research and noting that "stigma and its attendant prejudice, discrimination, and violence . . . underlie society's general lack of attention to [sexual minorities'] health needs and many of the health disparities discussed in this report").

[38] *Id.* at 295 (summarizing studies revealing correlations between experiences of stigma and health problems in gay and lesbian populations). More recent studies have similarly found correlations between experiencing manifestations of stigma and having psychological and physical health symptoms. *See, e.g.*, J. Almeida et al., *Emotional Distress Among LGBT Youth: The Influence of Perceived Discrimination Based on Sexual Orientation*, 38 J. Youth & Adolescence 1001 (2009) (in a probability sample of Boston high school students, finding significant correlations between perceived discrimination and depressive symptomatology and, in males, suicidal ideation and self-harm); J.J. Muehlenkamp et al., *Nonsuicidal self-injury in sexual minority college students: A test of theoretical integration*, 9 Child & Adolescent Psychiatry & Mental Health 16 (2015) (using a non-probability sample of sexual minority college students, finding significant correlations between sexual orientation-related minority stress—measured as

Because states—through their public schools and health care systems—often bear the costs of increased mental and physical health risks, they have an interest in enacting measures that could potentially assist in alleviating these risks. Accordingly, even beyond its general interest in counteracting discrimination, Colorado has an interest in ensuring that its population—including its population of sexual minorities—does not suffer adverse health outcomes because of stigmatization. The Colorado Anti-Discrimination Act is an effort to counteract the stigma that sexual minorities experience, and correspondingly,

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experiences of past negative treatment and expectations of future negative treatment because of one's sexual orientation—and suicidal ideation and non-suicidal self-harm); J.E. Pachankis et al, *A Minority Stress-Emotion Regulation Model of Sexual Compulsivity among Highly Sexually Active Gay and Bisexual Men*, 34 Health Psychol. 829 (2015) (in a nonprobability sample of gay men, finding significant correlations between levels of depression and anxiety and frequency of experiencing negative treatment because of one's sexual orientation); D.M. Frost & A.W. Fingerhut, *Daily exposure to negative campaign messages decreases same-sex couples' psychological and relational well-being*, 19 Grp. Processes & Intergroup Relations 477 (2016). Using a longitudinal design, another study found that on days in which individuals experienced increased (relative to average) exposure to anti-same-sex marriage messages during a statewide referendum campaign, they experienced significant increases in negative affect and significant decreases in positive affect and relationship satisfaction. These associations remained statistically significant, controlling for experiences of general daily stressors as well as pre-existing levels of depression and relationship satisfaction. S.S. Rostosky et al., *Marriage Amendments and Psychological Distress in Lesbian, Gay and Bisexual (LGB) Adults*, 56 J. Counseling Psychol. 56 (2009).

the health outcomes associated with experiencing stigmatization.

CONCLUSION

The pertinent scientific and professional literature supports the need for the protections of anti-discrimination statutes—such as Colorado's Anti-Discrimination Act—for sexual minorities. For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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